IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARSHA CASPAR, GLENNA DEJONG, CLINT McCORMACK, BRYAN REAMER, FRANK COLASONTI, JR., JAMES BARCLAY RYDER, SAMANTHA WOLF, MARTHA RUTLEDGE, JAMES ANTEAU, JARED HADDOCK, KELLY CALLISON, ANNE CALLISON, BIANCA RACINE, CARRIE MILLER, MARTIN CONTRERAS, and KEITH ORR,

Case No. 14-cv-11499
Hon. Mark A. Goldsmith

Plaintiffs,

vs.

RICK SNYDER, in his official capacity as Governor of the State of Michigan, MAURA CORRIGAN, in her official capacity as Director of the Michigan Department of Human Services, PHIL STODDARD, in his official capacity as Director of the Michigan Office of Retirement Services, and JAMES HAVEMAN, in his official capacity as Director of the Michigan Department of Community Health,

Defendants.

PLAINTIFFS' RESPONSE TO
DEFENDANTS' MOTION TO CONSOLIDATE
BLANKENSHIP v. SNYDER* WITH *CASPAR v. SNYDER

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Should irreparable harm to the *Caspar* plaintiffs be prolonged by consolidation with a case that presents very different questions and that has not even commenced motions practice, when motions for preliminary injunction, to dismiss, and to stay have already been fully briefed in *Caspar*?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Fed. R. Civ. P. 42(a)

E. D. Mich. L.R. 42.1

Cantrell v. GAF Corp., 999 F.2d 1007 (6th Cir. 1993)

Banacki v. OneWest Bank, 276 F.R.D. 567 (E.D. Mich. 2011)

INTRODUCTION

In other cases involving the perpetration of widespread harm by a small number of defendants, courts have sometimes consolidated cases that turned centrally on (i) identical conduct by plaintiffs and defendants and (ii) identical legal issues—at least so long as (iii) consolidation did not prejudice plaintiffs' ability to vindicate their rights. None of those conditions are satisfied here. In *Caspar*, where pretrial briefing is already at an advanced stage, Plaintiffs are seeking continued recognition of marriages that were performed in Michigan and were legally valid in this state when entered into. In *Blankenship*, where the only document filed besides the complaint is Defendants' notice of their motion to consolidate, the plaintiffs are seeking new legal recognition in Michigan for a marriage that was performed in another state.

In contrast to *Blankenship*, *Caspar* turns centrally on affirmative acts of marriage solemnization—both by Michigan government officials and by the *Caspar* Plaintiffs themselves—that took place in Michigan at a time when those affirmative acts had transformative legal effect under Michigan law. In contrast to *Blankenship*, the threshold legality under Michigan law of the *Caspar* Plaintiffs' marriages is not only straightforward but has in fact already been conceded by Defendants. And in contrast to *Blankenship*, the equal protection claim in *Caspar* turns on the discriminatory restriction of the fundamental right all spouses have in their existing in-state marriages, rather than (as in *Blankenship*) on a challenge to gender- and sexual orientation-based classifications as such, regardless of context. Unlike the *Blankenship* case, *Caspar* is thus completely distinct from the issues on appeal in *DeBoer* to boot.

On each count, *Blankenship* is simply a different case. The proposed consolidation would serve only to prolong the irreparable harm currently being suffered by the *Caspar* Plaintiffs, whose simple and straightforward claim can otherwise be adjudicated easily, quickly, and cleanly. To be clear, Plaintiffs believe that the Blankenships' marriage should also be recognized in Michigan. Because the two cases are so different and because the *Caspar* litigation is so much further advanced than *Blankenship*, however, the motion to consolidate the two cases should be denied.

BACKGROUND

Michigan Officials and the Caspar Plaintiffs Act In Concert to Solemnize the Caspar Plaintiffs' Marriages After the Marriage Ban Is Struck Down

Michigan revised its marriage laws in 1996 to bar same-sex couples from marrying by amending Mich. Comp. Laws § 551.2 to provide that "marriage is a civil contract between a man and a woman" and adding Mich. Comp. Laws § 551.1, which provides that "[a] marriage contracted between individuals of the same sex is invalid in this state." In 2004, Michigan amended its state constitution to prohibit marriages by same-sex couples. *See* Mich. Const. Art. I, § 25.

In January 2012, April DeBoer and Jayne Rowse, a same-sex couple, filed suit in the Eastern District of Michigan, challenging the constitutionality of Michigan's Marriage Amendment under the U.S. Constitution's Equal Protection and Due Process Clauses. *DeBoer v. Snyder*, E. D. Mich. No. 2:12-cv-10285 (Friedman, J.). On March 21, 2014, following a bench trial, Judge Friedman issued an opinion holding that the Marriage Amendment "impermissibly discriminates against same-sex couples in violation of the Equal Protection Clause because the provision does not advance any conceivable legitimate state interest." *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 768 (E.D. Mich. 2014). The court enjoined enforcement of the Marriage Amendment and its implementing statutes. *Id.* at 775. The court did not stay its judgment.

Plaintiffs Marsha Caspar and Glenna DeJong have been in a committed relationship for 27 years. (Compl. ¶ 41.) They have long wanted to marry as a way to publicly express their love and devotion to one another. (Compl. ¶ 42.) They considered moving to a state that allows marriage for same-sex couples, but decided instead to remain in Michigan and wait for the day they could wed at home. (Compl. ¶ 42.) At long last, the *DeBoer* judgment made that possible.

Along with approximately 300 other same-sex couples, Caspar, DeJong, and the remaining plaintiff couples were legally married on March 21, 2014. (Compl. ¶¶ 10-17, 30.) In accordance with Michigan law,[1] each plaintiff couple applied for and received the requisite marriage licenses from officials duly authorized by state law to provide them. Each plaintiff couple then immediately performed the official ritual of marriage—exchanging solemn declarations of matrimony before two witnesses and a celebrant as required by law. And each plaintiff couple received official records documenting their marriage. (Compl. ¶¶ 10-17, 44, 49, 56, 63, 68, 80, 88.) *See* Mich. Comp. Laws § 551.18 ("The original certificates and records of marriage made by the person solemnizing the marriage as prescribed in this chapter, and the record thereof made by the county clerk . . . shall be received in all courts and places, as presumptive evidence of the fact of the marriage.").

Late in the afternoon of March 22, 2014, the Sixth Circuit entered an order temporarily staying the judgment in *DeBoer*. Once the stay order was entered,

[1] Michigan law requires the observation of two specific formalities before the state will clothe the parties' consent to marriage with the approbation of law. First, "all parties intending to be married" must "obtain a marriage license from the county clerk" and "deliver the said license to the clergyman or magistrate who is to officiate, before the marriage can be performed." Mich. Comp. Laws § 551.101; *see also* Mich. Comp. Laws § 551.2 (requiring license). Second, the parties must then "solemnly declare, in the presence of the person solemnizing the marriage and [at least two] attending witnesses, that they take each other as [spouses]." Mich. Comp. Laws § 551.9; *see also* Mich. Comp. Laws § 551.2 (requiring solemnization); Mich. Comp. Laws § 551.7 (enumerating persons authorized to solemnize marriage).

county clerks in Michigan stopped issuing marriage licenses to same-sex couples. On March 25, 2014, a Sixth Circuit panel continued the stay of the judgment in *DeBoer* pending final disposition of the appeal. Dkt. 20-9, Order to Stay in DeBoer (March 25, 2014), *also available at* 2014 U.S. App. LEXIS 7259.

On March 26, Governor Snyder's office issued the following statement:

> After comprehensive legal review of state law and all recent court rulings, we have concluded that same-sex couples were legally married at county clerk offices in the time period between U.S. District Judge Friedman's ruling and the 6th U.S. Circuit Court of Appeals temporary stay of that ruling. . . . The couples with certificates of marriage from Michigan courthouses last Saturday were legally married and the marriage was valid when entered into.

(Compl. ¶ 36.) During a press conference later that day, Governor Snyder reaffirmed this position. As he put it, "in respect to the marriages themselves, the 300 marriages on that Saturday, we believe those are legal marriages and valid marriages. The opinion had come down. There had not been a stay in place. So with respect to the marriage events on that day, those were done in a legal process and were legally done." (Compl. ¶ 37.)

The Governor simultaneously proclaimed, however, that "the rights tied to" these valid marriages "are suspended until the stay is lifted or Judge Friedman's decision is upheld on appeal." (Compl. ¶ 36.) As the Governor explained during his subsequent press conference, "the State of Michigan will not recognize the fact that they're married" and "won't recognize the benefits of that marriage" until the removal of the stay or the affirmance of the *DeBoer* judgment. (Compl. ¶ 37.)

Marsha Caspar, Glenna DeJong and the other plaintiffs brought this action soon thereafter in order to remedy Michigan's refusal to grant full legal recognition to marriages that the State otherwise has recognized as valid. The *Caspar* Plaintiffs' case is at an advanced stage of pretrial motions—with motions for a preliminary injunction, to dismiss, to hold in abeyance, and to consolidate now each having been either fully or mostly briefed. (Defts' Mot to Consol. 1-2.)

The *Blankenship* Plaintiffs File Suit to Compel Michigan to Recognize Their Out-of-State Marriages

Erin Dawn Blankenship and Shayla Dawn Blankenship are a same-sex couple who live in Michigan and are raising two children in a loving, stable household. (*Blankenship* Compl. ¶¶ 5-6, 21-22.) In 2013, the Blankenships traveled from Michigan to legally marry in the State of New York. (*Blankenship* Compl. ¶¶ 18-19, 23.) Michigan has never recognized the Blankenships' New York marriage. (*Blankenship* Compl. ¶¶ 24-28.) Sometime after the district court decision in *DeBoer*, the Blankenships sought to effectuate second-parent adoptions for each of their two children. (*Blankenship* Compl. ¶¶ 5 15-17, 18-22.) Since the *DeBoer* decision had been stayed by the Sixth Circuit, the Blankenships argue that those adoptions were prohibited by Michigan law. They further assert that state officials accordingly denied the Blankenships' applications. (*Blankenship* Compl. ¶¶ 37-38.)

The Blankenships filed suit challenging that denial in the Eastern District of Michigan. They claim that Michigan's refusal to recognize their out-of-state marriages violates the Equal Protection Clause, since Michigan recognizes other kinds of out-of-state marriages that would be invalid if solemnized in Michigan. (*Blankenship* Compl. ¶¶ 33-34, 41-42.) The Blankenships also claim that their New York marriage creates a substantive entitlement that is enforceable against Michigan under the Due Process Clause. (*Blankenship* Compl. ¶¶ 50, 52-53).

LEGAL STANDARD

Under Federal Rule of Civil Procedure 42(a)(2), if consolidation would not significantly prejudice the rights of the parties, a court may, at its discretion:

> consolidate actions involving "a common question of law or fact." *Cantrell v. GAF Corp*., 999 F.2d 1007, 1011 (6th Cir.1993). The party moving for consolidation bears the burden of demonstrating the commonality of law, facts or both in cases sought to be combined, *Young v. Hamric*, 2008 WL 2338606 at *4 (E.D. Mich.2008), and the court must examine "the special underlying facts" with "close attention"… *In re Repetitive Stress Injury Litigation*, 11 F.3d 368, 373 (2d Cir.1993).

Banacki v. OneWest Bank, 276 F.R.D. 567, 571 (E.D. Mich. 2011). Consolidation is thus provisionally appropriate where (i) the defendants and the plaintiffs were involved in substantially identical specific conduct[2] and (ii) the dominant legal issues are identical at a significant level of specificity.[3]

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[2] For decisions granting motions to consolidate, see, *e.g.*, *Cantrell*, 999 F.2d at 1010-11 (consolidating two cases presenting "the same factual . . . questions" regarding one employer's "exposure [of its employees] to asbestos during the course of their employment," where all plaintiffs were employed "in the production of building materials, an ingredient of which was asbestos fiber"); *Stemler v. Burke*, 344 F.2d 393 (6th Cir. 1965) (consolidating five actions arising from a simultaneous crash between 3 cars in one accident); *Saxion v. Titan-C-Manufacturing*, 86 F.3d 553 (6th Cir. 1996) (consolidating suits based on the defendant's closure of a specific manufacturing facility without giving required statutory warning); *Holliday v. Davis*, 772 F.2d 907 (W.D. Tenn. 1985) (consolidating suits arising from a single prison disturbance); *Matrix Architects, Inc. v. Community Health Professionals, Inc.*, 2005 WL 2850130, *1 (S.D. Ohio) (consolidating two cases presenting "identical" factual issues in a dispute between a copyright holder and an alleged violator).

For decisions denying motions to consolidate, see, *e.g.*, *Hasman v. G.D. Searle & Co.*, 106 F.R.D. 459, 460 (E.D. Mich. 1985) (denying a motion to consolidate three products liability claims—each involving an IUD manufactured by the same defendant that allegedly caused each plaintiff's pelvic inflammatory disease—since "many of the factual and legal issues involved are significantly different"); *WCM Indus. V. IPS Corp.*, 2013 WL 3349182, *3-4 (W.D. Tenn.) (denying a motion to consolidate two cases involving two different patents for a "waste water insert," since "[t]he fact that the relevant IPS products are plumbing products, and the fact that those products are designed for use in a bathtub, do not appear to be contested in either action, and thus do not establish a common question of fact.").

[3] For decisions granting motions to consolidate, see, *e.g.*, *Cantrell*, 999 F.2d at 1011 (consolidating two questions presenting "the same . . . legal questions," in that plaintiffs both sought relief in ordinary tort law rather than in doctrinally discrete administrative, statutory, or constitutional claims); *Holliday v. Davis*, 772 F.2d 907, *1 (W.D. Tenn. 1985) (consolidating two cases where "both appellants essentially made the same specific arguments in the district court," and in fact "filed identical briefs on appeal"); *Stemler v. Burke*, 344 F.2d at 395-396 (consolidating ordinary negligence claims).

"Whether cases present a common question of law or fact," however, "is only a threshold requirement; once a common question has been established, the decision to consolidate rests in the sound discretion of the district court." *Banacki*, 276 F.R.D. at 571. "In exercising its discretion" to decide this second question, "a court should weigh 'the interests of judicial economy against the potential for new delays, expense, confusion, or prejudice." *Id.* The Sixth Circuit has cautioned in particular that the district court's discretionary "decision to consolidate is one that must be made thoughtfully," emphasizing that "care must be taken that consolidation does not result in unavoidable prejudice or unfair advantage." *Cantrell*, 999 F.2d at 1011.

Even in cases presenting identical central questions of law and fact, therefore, consolidation has been approved only if it neither prejudiced plaintiffs' vindication of their rights nor prolonged any ongoing injury.[4] "[C]onsiderations of

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For decisions denying motions to consolidate, see, *e.g.*, *Kensu v. Rapelje*, 2014 WL 1415180, *1-2 (E.D. Mich.) (declining to consolidate deliberate indifference claims under the Eight Amendment, since without more "a common cause of action is not a common question of law"); *Hasman v. G.D. Searle & Co.*, 106 F.R.D. 459, 460 (E.D. Mich. 1985) (declining to consolidate three products liability claims—each involving an IUD manufactured by the same defendant that allegedly caused each plaintiff's pelvic inflammatory disease—since, "[w]hile the cases involve claims of similar injury . . . , many of the factual and legal issues involved are significantly different").

[4] *Cantrell*, 999 F.2d at 1011-1012 (no ongoing harm being inflicted by current defendant behavior; no objection made to consolidation at trial; no evidence admitted that could not already have been admitted in both trials); *Stemler v.*

convenience and economy must yield to a paramount concern for a fair and impartial trial. Although consolidation may enhance judicial efficiency, '[t]he systemic urge to aggregate litigation must not be allowed to trump [our judicial system's] dedication to individual justice.'" *Banacki*, 276 F.R.D. at 571 (brackets in original; internal citations omitted).

ARGUMENT

I. *CASPAR* AND *BLANKENSHIP* PRESENT DIFFERENT LEGAL CLAIMS AND TURN ON DIFFERENT OPERATIVE FACTS.

A. Unlike in *Blankenship*, the due process claim in *Caspar* turns on affirmative acts of marriage solemnization performed both by Plaintiffs and by Michigan officials, with concededly valid legal effect under Michigan law.

As explained in earlier briefing, it is irrefutably the case that the *Caspar* Plaintiffs are parties to marriages that were legally solemnized in Michigan, by Michigan officials, and at a time when the law in Michigan unequivocally sanctioned their union. (Mot for PI 4-6, 12-14; Resp to MTD 3-6, 13-17; Resp to Mot for Stay 3-6, 11-12) This crucial predicate to the due process claim in *Caspar* is not just straightforward; it is easy. It is so easy, in fact, that Governor Snyder has already expressly conceded it—twice. (*See* Compl. ¶¶ 36-37.)

Burke, 344 F.2d at 396 ("carefully prepared interrogatories" prevented confusion of the jury in the face of a multiplicity of parties); *Kensu v. Rapelje*, 2014 WL 1415180, *2 (E.D. Mich.) ("Even if Plaintiff's cases involved a common question of law or fact, this Court would still find consolidation inappropriate because it may create a risk of prejudice," since one case presented multiple *additional* legal issues that were not present in the other case).

The *Caspar* Plaintiffs are now seeking to compel the same state that solemnized their Michigan marriages—and only that state—to continue recognizing them. In contrast, the *Blankenship* plaintiffs were married in New York, pursuant to New York law, and at a time when Michigan law prohibited and did not recognize such marriages. The *Blankenship* plaintiffs are now seeking to compel recognition of their New York marriage by a different state—one that has rejected that marriage from the outset. The legal issues presented by the two cases are thus quite different.

This legal distinction is compounded by two equally important factual distinctions. First, the Blankenships undertook no act of legal significance when same-sex marriage was legal in Michigan—*i.e.*, during the pendency of the *DeBoer* trial court judgment. In *Caspar*, by contrast, Plaintiffs did exactly that: they got married. Second, no Michigan official ever acted to recognize—much less to solemnize—the Blankenships' marriage as valid and binding under Michigan law. In *Caspar*, by contrast, multiple government officials did exactly that, in accordance with Michigan law.

The only court previously to compare these two kinds of cases made a special point of emphasizing how different they are. In *Strauss v. Horton*, the California Supreme Court held that existing, valid in-state marriages of same-sex couples had not been terminated by the subsequent passage of a California constitutional amendment that categorically banned such marriages. When announcing its key holding in the final substantive paragraph of that opinion, the Court specifically went out of its way to bracket the precise question now raised by the Blankenships. It emphasized at length that

> We have no occasion in this case to determine whether same-sex couples who were lawfully married in another jurisdiction prior to the adoption of Proposition 8, but whose marriages were not formally recognized in California prior to that date, are entitled to have their marriages recognized in California at this time. None of the petitioners before us in these cases falls within this category, and in the absence of briefing by a party or parties whose rights would be affected by such a determination, we conclude it would be inappropriate to address that issue in these proceedings.

Strauss v. Horton, 207 P.3d 48, 122 n.48 (Cal. 2009). It would be equally inappropriate to address that issue in the *Caspar* proceedings today.

B. Unlike in *Blankenship*, the equal protection claim in *Caspar* turns on the discriminatory restriction of a fundamental right and is thus distinct from the issues on appeal in *DeBoer*.

As explained in earlier briefing, the equal protection claim in *Caspar* is grounded in the discriminatory restriction of a fundamental right, without regard to the particular classification on which that discrimination is based. (*Caspar* Compl. ¶ 100; Mot for PI 20-23; Resp to MTD 23-26.) The equal protection claim in *Blankenship*, by contrast, relies on an entirely different challenge to classification "because of . . . sex and sexual orientation" generally, regardless of whether the affected right is substantively fundamental. (*Blankenship* Compl. ¶ 44.)

These claims will thus involve different legal predicates, different governing precedent, and different factual showings. That alone means that the two cases should not be consolidated under Sixth Circuit precedent. *See supra* at 7-10. In addition, however, the equal protection claim in *Blankenship* appears identical to the issue on appeal in *DeBoer*, which likewise turns on a claim that the Michigan marriage ban "impermissibly discriminates against same-sex couples." *DeBoer*, 973 F. Supp. 2d at 769 (finding it "unnecessary to address whether [the ban] burdens the exercise of a fundamental right").[5] The equal protection claim in *Caspar*, by contrast, is completely distinct from the issues on appeal in *DeBoer*, both factually and conceptually. (Resp to Mot to Stay 11-18.) Here again, *Caspar* and *Blankenship* are two very different cases presenting very different questions of both law and fact.

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[5] Other courts in the Sixth Circuit have addressed equal protection claims like those asserted in *Blankenship*. *See, e.g.*, *Bourke v. Beshear*, __ F. Supp. 2d __, 2014 WL 556729 (W.D. Ky. Feb 12, 2014) (same-sex couples with valid out-of-state marriages challenge denial of "state recognition and benefits of marriage available to similarly situated opposite-sex couples"), *appeal docketed*, No. 14-5291 (March 19, 2014). It is instructive that the district court in *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), *aff'd*, __ F.3d __, 2014 WL 2868044 (10th Cir. June 25, 2014), decided the due process and equal protection claims not only of couples seeking to marry for the first time, but also of couples seeking recognition of an existing out-of-state marriage, 961 F. Supp. 2d at 1188—an issue that the district court in *Evans v. Utah*, __ F. Supp. 2d __, 2014 WL 2048343 (D. Utah May 19, 2014), distinguished as "separate and distinct" from the due process claims of couples in their *in-state* marriages. *Id.* at *7.

II. CONSOLIDATION WOULD PROLONG THE IRREPARABLE HARM BEING SUFFERED BY THE *CASPAR* PLAINTIFFS, WHOSE SIMPLE CLAIMS CAN OTHERWISE BE ADJUDICATED EASILY, QUICKLY, AND CLEANLY.

The *Caspar* Plaintiffs are currently suffering irreparable harm that is compounded every day that they must await legal vindication. (Mot for PI 24-26; Repl to Dfts' Resp to Mot for PI 3-5.) Their case is already well advanced, with briefing complete on motions for a preliminary injunction, to dismiss, and to hold in abeyance. Furthermore, as explained both above and in earlier briefing (Mot for PI 11-24; Resp. to MTD 12-26), the adjudication of *Caspar* should be easy, quick, and clean. In the *Blankenship* case, by contrast, pretrial motion practice has not even started. Weighing the *Caspar* process down with a brand new set of unnecessary and irrelevant legal issues from *Blankenship* would be entirely at odds with the principles outlined in *Cantrell v. GAF Corp.* and *Banacki v. OneWest Bank*. *See supra* at 7-10.

CONCLUSION

Plaintiffs support the Blankenships and believe that Michigan should recognize the Blankenship marriage just as it recognizes the marriages of different-sex couples who were legally married in other states. But for the reasons set forth above, the Blankenships should vindicate their rights in a separate proceeding. Defendants' motion to consolidate should be denied.

Respectfully submitted,

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Dated: July 18, 2014

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court using the ECF system on this 18th day of July, 2014 which will send notice of this filing to all registered parties via electronic transmission.

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